

1 **UNITED STATES DISTRICT COURT**
2 **NORTHERN DISTRICT OF OHIO**
3 **EASTERN DIVISION**

4 **UNITED STATES OF AMERICA,)**
5 **Plaintiff,)**
6 **vs.)**
7 **RYAN D. MALONE,)**
8 **Defendant.)**

9
10 **TRANSCRIPT OF PROCEEDINGS**
11 **BEFORE THE HONORABLE BENITA Y. PEARSON**
12 **UNITED STATES DISTRICT JUDGE**

13 **RESENTENCING**

14 **APPEARANCES:**

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30 Proceedings recorded by mechanical stenography;
31 transcript produced by computer-aided transcription.

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1 P R O C E E D I N G S
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3 THE CLERK: The matter before the court is Case
4 Number 1:14-cr-438, the United States of America versus
15:09:44 5 Defendant Number 1, Ryan D. Malone.

6 THE COURT: Good afternoon, everyone. You may all
7 retake your seats.

8 Counsel for the United States, will you please
9 introduce yourself for the record and the person seated with
15:09:55 10 you at counsel's table?

11 MS. KLUMP: Good afternoon, Your Honor. Kendra
12 Klump for the United States, along with FBI Special Agent
13 Paul Cruz.

14 THE COURT: Welcome to you both.

15:10:06 15 MS. KLUMP: Thank you.

16 THE COURT: Counsel for Mr. Malone, will you
17 please introduce yourself for the record along with your
18 client?

19 MR. THOMPSON: Good afternoon, Your Honor. Darin
15:10:13 20 Thompson from the Federal Public Defender Office, and to my
21 left is Ryan Malone.

22 THE COURT: Good afternoon to you, Mr. Thompson,
23 and welcome to you all.

24 This matter has been scheduled to allow the court
15:10:25 25 to resentence you, Mr. Malone, and this resentencing has

1 become necessary given that the Sixth Circuit has vacated my
2 original sentence in line with intervening case law that we
3 colloquially refer to as Johnson.

4 Since then, there have been reissued presentence
15:10:46 5 reports and memoranda on behalf of the United States and you
6 by Mr. Thompson. But in a rather uncharacteristic move, I
7 also have several motions filed by you, which is rather
8 surprising given that the court has appointed counsel for
9 you; and not just any counsel, but counsel that hails from
15:11:07 10 one of the best defense firms in the Northern District of
11 Ohio. And he's seated with you now at counsel's table.

12 So what I'll do is start this hearing by taking up
13 only one of your motions, because only one matters to me
14 today, and it's the motion to discharge and appoint new
15 counsel. Because you see, if I do neither, discharge
16 Mr. Thompson or appoint new counsel, then your other motions
17 won't matter, because I will believe, unless he tells me
18 differently, that he has spoken for you.

19 Because when a defendant has counsel, that counsel
15:11:41 20 speaks for the defense in this room. That makes sense,
21 doesn't it?

22 THE DEFENDANT: It does, Your Honor.

23 THE COURT: Then stop. I didn't ask for an
24 explanation.

15:11:50 25 Mr. Thompson, I am interested in hearing from you.

1 I am speaking about this motion that's docketed as ECF
2 Number 103, dated the 11th of October, 2016. You've seen
3 it, haven't you?

4 MR. THOMPSON: I have, Your Honor.

15:12:05 5 THE COURT: Ms. Klump, you've seen it as well?

6 MS. KLUMP: Yes, Your Honor.

7 THE COURT: Mr. Thompson, I'd like to know what
8 your position is regarding this, what discussions you've had
9 that you can share that don't violate attorney-client
15:12:17 10 privilege, and, quite simply, if you're still interested in
11 representing Mr. Malone and/or whether or not he has an
12 interest in persisting with this motion or withdrawing it.

13 MR. THOMPSON: Your Honor, in my opinion, there
14 isn't a breakdown of communication such that new counsel
15 needs to be appointed. Mr. Malone and I have had
16 disagreements about a number of legal theories he wants to
17 pursue. Some of them are addressed in his pro se motions.
18 It's not uncommon for appointed counsel and defendant to
19 disagree about things like this. So it didn't strike me as
15:13:00 20 sufficiently unusual or outside the norm.

21 THE COURT: Well, it's outside of the norm and
22 sufficiently unusual for these to be memorialized on the
23 docket. Maybe not in general conversation. But I
24 referenced ECF 103, the Motion to Discharge, and then what's
15:13:17 25 stated there is echoed in ECF 111, which is styled both as a

1 Motion to Compel Answer to Defendant's Filed Motion to
2 Discharge and Appoint New Counsel. And I'm not sure from
3 whom Mr. Malone intended to compel an answer, perhaps from
4 myself.

15:13:34 5 So your answer to the question appears to be you
6 don't believe there is a breakdown and you are not asking me
7 to remove you as counsel?

8 MR. THOMPSON: That's correct, Your Honor.

9 THE COURT: Let me hear from you, Mr. Malone.

15:13:45 10 Stand up, please.

11 I have your motion, motions, maybe, given the echo
12 in ECF 111. Are you still interested in having me remove
13 Mr. Thompson or at least consider doing that?

14 THE DEFENDANT: Well, Your Honor, Mr. Thompson and
15 myself did have a conversation last week prior to him coming
16 to see me on November the 1st when I refused to speak with
17 him. He returned to see me on November the 7th, and we did
18 sit down and have a conversation.

19 So as of today, I do not wish to continue to
20 remove him.

21 THE COURT: Are you withdrawing your motion asking
22 me to discharge him and replace him with new counsel then?

23 THE DEFENDANT: Yes, I am, Your Honor.

24 THE COURT: I will mark the motion as withdrawn,
25 that being ECF 103 and also ECF 111.

1 Mr. Thompson, what else is on the docket and
2 authored by Mr. Malone and not you come at ECF 107 and 112.
3 One is styled a Motion to Correct Error in PSR. The other
4 is Addendum to Defendant's Sentencing Memorandum, Downward
15:15:03 5 Departure Request and RDAP Request. It appears that
6 Mr. Malone had even more to say than you, because you
7 certainly wrote to me about both those points.

8 Have you reviewed these writings?

9 MR. THOMPSON: I have, Your Honor.

10 THE COURT: Are you prepared, to the extent you
11 believe it necessary, to incorporate them in your
12 representation of Mr. Malone today?

13 MR. THOMPSON: Yes, Your Honor.

14 THE COURT: All right then. Then that's how we'll
15 address those.

16 Thank you, Mr. Malone. You may retake your seat.

17 I've already identified matters that -- documents
18 that I've addressed in preparation for today's resentencing
19 hearing, and included in that, the memoranda filed on behalf
20 of the United States by you, Ms. Klump. Also the memorandum
21 filed by Mr. Thompson. That will, of course, include, to
22 the extent he believes additional mention is necessary, 107
23 filed by Mr. Malone and 112 filed by Mr. Malone.

24 And there is the revised presentence investigation
15:16:09 25 report. And perhaps this is the best time for me to

1 introduce, or ask that he introduce himself on the record,
2 the writer of this report.

3 Will you do that, sir?

4 PROBATION OFFICER: Good afternoon, Your Honor.

15:16:20 5 Jordan Wlotzko with United States Probation.

6 THE COURT: Thank you for authoring this report
7 and for being here today.

8 And the report I'm referring to, as you know,
9 there are several, but I'm looking at the one that was last
15:16:32 10 revised on October 1st, this year, 2016.

11 Ms. Klump, do you have that same report?

12 MS. KLUMP: Yes, Your Honor.

13 THE COURT: Have you had sufficient time to review
14 it?

15:16:44 15 MS. KLUMP: Yes, I have.

16 THE COURT: When I review the objections that are
17 at the back of that report, starting in the addendum on page
18 23, I note that there are no objections there on behalf of
19 the United States.

15:16:55 20 Is that still the case?

21 MS. KLUMP: Yes, Your Honor.

22 THE COURT: Mr. Thompson, again, we're focused on
23 the report that was last revised on -- it says last revised
24 October 1, Mr. Wlotzko, but it was filed on November 1.

15:17:16 25 PROBATION OFFICER: That should be November 1st,

1 Your Honor.

2 THE COURT: So the revision date is November 1?

3 PROBATION OFFICER: Yes, Your Honor.

4 THE COURT: Does that change your answer at all,

15:17:22 5 Ms. Klump?

6 MS. KLUMP: No, Your Honor.

7 THE COURT: So, Mr. Thompson, I'm talking about
8 the November 1 report. Do you have it, sir?

9 MR. THOMPSON: I do, Your Honor.

15:17:30 10 THE COURT: And when I ask you to look at the
11 addendum, there are objections there on behalf of your
12 client. Are all of your objections summarized on the pages
13 that span from 23 to 25, sir?

14 MR. THOMPSON: Yes, Your Honor.

15:17:51 15 THE COURT: And, of course, if you believe, before
16 we separate, that there's something more you'd like to bring
17 up, you are free to do it here today and I'll decide what to
18 do about that.

19 What I'd like to do is to speak about these
20 objections as we go through the final presentence report,
21 Mr. Malone. It tends to make more sense when we do it that
22 way.

23 There are a couple of statements in this section,
24 Mr. Wlotzko, that I don't really understand, so it's hard
15:18:26 25 for me to weave them in.

1 So, for instance, sir, on page 24, at the very
2 top, it says paragraph number 2, and then it speaks about an
3 adjusted offense level that's different from the calculated
4 adjusted offense level. I'm not sure what you mean there.

15:18:46 5 PROBATION OFFICER: In my response to objection
6 number 2?

7 THE COURT: No. If you're telling -- I'm talking
8 about the paragraph that's at the top of page 24 that begins
9 "2" period. Are you saying that that's Mr. Malone's
10 objection?

11 PROBATION OFFICER: Yes.

12 THE COURT: And then your answer --

13 MR. THOMPSON: The second objection.

14 THE COURT: -- is --

15 MR. THOMPSON: I had the same question the judge
16 has.

17 THE COURT: Mr. Thompson, will you say that again?
18 I could hear you partially.

19 MR. THOMPSON: Oh, I apologize, Your Honor.

15:19:19 20 THE COURT: Well, that's okay, because you may be
21 able to help me. What is that, if it's not an objection?

22 MR. THOMPSON: The ones with the numbers in front,
23 "2," and then there's a section with a heading "Response by
24 U.S. Probation Officer," below that there's a section that
15:19:31 25 doesn't have a heading but just says a "3" --

1 THE COURT: Yes.

2 MR. THOMPSON: -- and there's a response. Those
3 are the objections. The numbered ones are the objections.

4 THE COURT: And that's what I don't understand.
15:19:41 5 Unless you're saying that because you don't believe the
6 four-level enhancement is appropriate, you think it should
7 be 22 and Mr. Wlotzko is responding, "No, I think 26
8 continues to be correct."

9 Do I understand you both then?

10 15:19:53 MR. THOMPSON: Yes.

11 PROBATION OFFICER: Yes, Your Honor.

12 THE COURT: Then stay on your feet for a moment,
13 because I want to make sure I understand item 3 in the same
14 way. So then at item 3, Mr. Thompson, based on the
15 objection as noted herein, the total offense level is 19,
16 and that's because you start at 22?

17 MR. THOMPSON: Yes.

18 THE COURT: But then you take out the two-level
19 adjustment -- I'm not sure how you get to 19. Tell me that.
15:20:21 20 Because 19 would require a three-level adjustment. Correct,
21 Mr. Wlotzko?

22 MR. THOMPSON: I believe the 19, Your Honor, would
23 be his total offense level after acceptance of
24 responsibility. I thought that was where I was going with
15:20:41 25 that.

1 THE COURT: So you would replace 26 with 22 and
2 then reduce it by three to get 19?

3 MR. THOMPSON: Yes, Your Honor.

4 THE COURT: All right. And, Mr. Wlotzko, to make
15:20:53 5 sure I understand you, you are persisting with 23?

6 PROBATION OFFICER: That's correct, Your Honor.

7 THE COURT: Okay. Fair enough. Then we can weave
8 those in as well.

9 So why don't we do this: Mr. Malone, you've done
15:21:03 10 this not so long ago, but I want to make sure still that you
11 understand and can follow along, because your assistance to
12 Mr. Thompson is going to be important.

13 The first thing I am going to do is go through
14 this report, make sure that I correctly calculate the
15 advisory sentencing guidelines range. I will speak with
16 your counsel, with the government's counsel about the
17 objections that are in this report to the calculation as it
18 now exists.

19 Once I've satisfied myself about the offense
15:21:29 20 level, I will move on to the criminal history category. I
21 know that Mr. Thompson has something to say about that as
22 well, believing that it overstates your criminal history
23 position.

24 Once I'm satisfied that I have the accurate range,
15:21:44 25 I will then move on to the second phase of the hearing, and

1 that phase is the phase during which I'll hear from counsel.
2 I'll hear from Ms. Klump first on behalf of the United
3 States. I will then hear from Mr. Thompson. Lastly, I will
4 hear from you. Whatever it is you'd like to say, I will
15:21:59 5 seriously consider.

6 And then the third and final phase is the phase
7 during which I impose sentence.

8 Make sense?

9 THE DEFENDANT: Yes, Your Honor.

10 THE COURT: All right then.

11 Counselors and Mr. Malone, because we've all
12 reviewed this report, that being the November 1, 2016
13 report, I won't speak about every paragraph of this
14 multi-paragraph, multipage report on the record, but I will
15 ask you to turn to certain portions of it with me, because
16 these portions are of some importance to me, maybe greater
17 than other parts, and also are referenced later. So I want
18 to be sure that we're all aware.

19 The first place I'd like to draw your attention is
20 at page 4, page 4 and also page 5, under the offense
21 conduct, paragraphs 7 and 8 seems to be pretty consistent
22 with the renditions given in earlier versions of this
23 report. And these two paragraphs are referenced in the
24 offense calculation, which we'll turn to in a moment.

15:23:05 25 The next place I'd like to -- well, having drawn

1 your attention to that, and while I think I understand that
2 the objections as they stand now are captured in the
3 addendum, any objection to paragraph 7 or 8, Ms. Klump?

4 MS. KLUMP: No, Your Honor.

15:23:21 5 THE COURT: Mr. Thompson?

6 MR. THOMPSON: To be clear, we don't have an
7 objection to the facts related in 7 and 8, only insofar as
8 they are a reflection of what's contained in Cleveland
9 police reports.

15:23:37 10 THE COURT: Understood. And I'm certainly not
11 asking you to adopt the report.

12 So then, stay on page 5 with me. Under
13 "Adjustment for Acceptance of Responsibility," paragraph 12
14 is a very short paragraph that simply states, "The defendant
15 provided the following statement through defense counsel
16 wherein he admitted involvement in the offense."

17 What's in quotes, Mr. Malone, I want to make sure
18 you still agree with, so I'll read it and afterwards ask if
19 it's still indeed your statement and a statement that you
20 continue to agree with.

21 "On November 4th, 2014, I possessed the firearm
22 described in the indictment after having been convicted of a
23 felony. I deeply regret my conduct and ask the court for
24 lenience."

15:24:25 25 Mr. Malone, is that your statement, sir?

1 THE DEFENDANT: Your Honor, so that I wouldn't be
2 confused, I would like to ask this pertaining to your
3 question on page 5, paragraph 12 as far as it is stating
4 that I admitted involvement in the offense, is this
15:24:47 5 referencing the two paragraphs that you just quoted, page
6 7 -- paragraphs 7 and 8?

7 THE COURT: Mr. Thompson may want to speak with
8 you, but let me say this: It's your statement, so I think
9 it's probably most fair for you to tell me what you mean in
15:25:03 10 paragraph 12 on page 5.

11 Would you like to speak with him first,
12 Mr. Thompson?

13 MR. THOMPSON: Please, Your Honor.

14 THE COURT: Certainly.

15:25:12 15 (Discussion held off the record between the defendant
16 and Mr. Thompson.)

17 THE DEFENDANT: Okay. Yes, Your Honor, as far as
18 the statement that I made in paragraph 12, where I admitted
19 that I possessed the firearm described in the indictment,
15:25:41 20 yes, that statement is true.

21 THE COURT: Thank you. And it's a statement that
22 you continue to agree with today?

23 THE DEFENDANT: Yes, Your Honor.

24 THE COURT: Thank you. Now, still on page 5, but
15:25:53 25 now we're under the subtopic heading "Offense Level

1 Computation." You can see what's first there is
2 Mr. Wlotzko's description of which Guidelines Manual he's
3 used; and he's using the most current one, that being the
4 one issued November 1, 2015. And he explains there that it
15:26:16 5 was used to determine the offense level.

6 Any objection to that, Ms. Klump?

7 MS. KLUMP: No, Your Honor.

8 THE COURT: Mr. Thompson?

9 MR. THOMPSON: No, Your Honor.

10 15:26:22 THE COURT: So now, because there is only the one
11 offense to be calculated, and that is the felon in
12 possession of a firearm and ammunition offense that's
13 summarized without a numbered paragraph, we can move on to
14 paragraph 14. And I don't expect disagreement here. I
15 think this is a paragraph that is corrected based upon the
16 Sixth Circuit's ruling following the Supreme Court's
17 issuance of the Johnson decision.

18 I think we all recall that the last time we saw a
19 paragraph similar to 14 relative to Mr. Malone, there were
20 two offenses there. Now there is only one prior offense,
21 which is a trafficking offense in which Mr. Malone was
22 convicted in Common Pleas Court in Cuyahoga County. The
23 Case Number 06483164 is given. And using that in
24 combination with Section 2K2.1, subsection (a) (4) (A), a base
15:27:27 25 offense level of 20 is attributed to Mr. Malone.

1 Any objection to that, Ms. Klump?

2 MS. KLUMP: No, Your Honor.

3 THE COURT: Any objection to that paragraph,

4 Mr. Thompson?

15:27:36 5 MR. THOMPSON: Your Honor, may I have a moment to
6 speak with Mr. Malone about this?

7 THE COURT: Certainly.

8 MR. THOMPSON: Thank you.

9 (Discussion held off the record between the defendant
15:29:36 10 and Mr. Thompson.)

11 MR. THOMPSON: Your Honor?

12 THE COURT: Yes, sir.

13 MR. THOMPSON: If I could just indicate on the
14 record the source of -- or, rather, the conversation
15 Mr. Malone and I were just having about this paragraph.

16 Mr. Malone wants me to object to the application
17 of this base offense level 20, application of --

18 THE COURT: Mr. Thompson, do me the favor of
19 directing upwards your microphone.

15:30:13 20 MR. THOMPSON: Sorry, Your Honor.

21 Your Honor, Mr. Malone wants me to take the
22 position that the trafficking offense in his past does not
23 qualify as a controlled substance offense. I believe, and
24 I'm not entirely sure I could articulate it correctly, but I
15:30:37 25 believe that his argument would involve whether or not using

1 the modified categorical approach, that drug trafficking
2 would qualify as a controlled substance offense for purposes
3 of the guidelines.

4 I have indicated to him that I believe that
15:30:52 5 argument does not have merit, and that, therefore, I cannot
6 raise it. He asks simply that I address it with the court
7 in this fashion, and I don't know if the court has any
8 guidance as to what direction we should go from here.

9 THE COURT: Well, you have raised it, and I
15:31:12 10 appreciate you raising it and also remarking that you
11 believe it doesn't have merit. I believe it doesn't have
12 merit. So it's raised. It's overruled.

13 THE DEFENDANT: Okay.

14 THE COURT: And I do apply the base offense level
15:31:24 15 of 20 for the reasons given in paragraph 14. It's preserved
16 if you should like it reviewed later.

17 Make sense?

18 THE DEFENDANT: Yes, Your Honor.

19 MR. THOMPSON: Thank you, Your Honor.

15:31:33 20 THE COURT: Certainly.

21 Now then, let's move on to page 6, specific
22 offense characteristic, 15, paragraph 15, I should say.
23 This is one section to which Mr. Malone has an objection
24 that is remarked upon in the addendum. And what is
15:32:01 25 suggested at paragraph 15 is that -- or perhaps maybe it's

1 not that he's objecting to, Mr. Thompson. You'll tell me in
2 a moment.

3 The firearm was stolen. When that's the case,
4 Section 2K2.1(b) (4) suggests increasing the base offense
15:32:21 5 level by two levels. That was done, as is shown in
6 paragraph 15.

7 Do you have an objection to that increase by two
8 levels because the firearm was stolen, Ms. Klump?

9 MS. KLUMP: No objection, Your Honor.

10 THE COURT: And we're talking about the Glock that
11 was found on the possession of Mr. Malone when he was
12 arrested, correct, Ms. Klump?

13 MS. KLUMP: Yes, Your Honor.

14 THE COURT: Mr. Thompson, your position regarding
15:32:47 15 paragraph 15's increase by two levels?

16 MR. THOMPSON: No objection, Your Honor.

17 THE COURT: Then I adopt that increase by two
18 levels.

19 So now we're on specific offense characteristic
20 identified in paragraph 15. And this is one that's been
21 subject of much discussion. It's pursuant to Section
22 2K2.1(b) (6) (B), and it is applied if the defendant used or
23 possessed any firearm or ammunition in connection with
24 another felony offense or, possessed or transferred any
15:33:23 25 firearm or ammunition with intent, knowledge or reason to

1 believe that it would be used or possessed in connection
2 with another felony offense.

3 You can see what explanation is written there.

4 And this is when Mr. Wlotzko refers back to paragraphs 7 and
15:33:41 5 8 that we've already spoken about.

6 What's written here is, "As noted in the offense
7 conduct section," and that's primarily paragraphs 7 and 8,
8 "the defendant was arrested while in possession of a firearm
9 after committing numerous felony offenses where a firearm
15:33:55 10 was possessed. Defendant was indicted on charges of
11 kidnapping with firearm specifications, repeat violent
12 offender specification, abduction with firearm
13 specifications, felonious assault with firearm
14 specifications, and repeat violent offender specifications,
15 having weapons while under a disability, carrying concealed
16 weapons, possessing criminal tools and receiving stolen
17 property in Cuyahoga County Court of Common Pleas," and the
18 case number is given as 14591007.

19 And as we know, that same case is remarked upon
15:34:34 20 later in this report in the criminal history section, and
21 that is not scored. It is paragraph 48. And it's remarked
22 there that "Victim failed to appear. Prosecutor's motion to
23 continue denied. Case dismissed."

24 So, Mr. Thompson, now might be the best time to
15:34:54 25 let you go first this time to weave in your objection to the

1 application. You've written articulately in the memorandum,
2 and Ms. Klump has as well. So I'll let you start and I'll
3 allow her to respond, give you the last word and I'll rule.

4 Is that fair?

15:35:12 5 MR. THOMPSON: It is, Your Honor.

6 Your Honor, if I may just -- whenever I appear
7 before Your Honor, I say the same thing I feel, which is,
8 you know, I'm going to try not to just repeat what I put in
9 the memorandum, but as a lawyer, unfortunately, I can't help
15:35:28 10 but repeat myself sometimes. I feel like sometimes I
11 believe I'm getting paid by the word. But I can't help but
12 go over this argument again, Your Honor.

13 I understand that the standard is low for
14 establishing a special offense characteristic like this,
15 that it's not beyond a reasonable doubt. But at the same
16 time, it's more than a scintilla, it's more than probable
17 cause.

18 This case was dismissed against him. There is no
19 evidence in the record about who this witness was,
15:36:00 20 specifically what they saw, the circumstances under which
21 they saw it. They identify one handgun, four individuals.
22 Who has the handgun? There's no indication. Does this
23 witness have any kind of criminal record, any baggage?
24 There's no indication at all.

15:36:16 25 Why did the -- why didn't the people who were

1 necessary to prosecute this case fail to show up? Well, the
2 government will suggest, I would surmise, that, well,
3 perhaps they were intimidated, or perhaps they were --
4 perhaps there is some nefarious explanation that is still
15:36:38 5 consistent with guilt of this conduct.

6 But I would respectfully suggest that it is far
7 more likely that the reason they did not go forward was
8 because they did not -- they didn't want to go into court
9 and continue telling this false story.

10 Not only do I think there isn't sufficient
11 evidence to show the connection between the firearm he was
12 arrested with and whatever firearm is alleged to have been
13 used by whomever in this prior alleged kidnapping, I am not
14 even sure that there is sufficient proof here that a
15 kidnapping even occurred.
15:37:17

16 This call to someone asking for \$200,000 in
17 ransom, why would anybody have a belief that this Mr. Yates
18 has \$200,000 in cash to give up as a ransom? This is --
19 according to the police reports, this stemmed from a
20 purchase of -- attempted purchase of stolen clothes by the
21 alleged victim, Ivory Yates, from the brother of Mr. Malone,
22 and then spiraled into this. After a call to the police,
23 they managed to locate two individuals. People calling did
24 accurately describe someone they obviously knew, because
15:37:51 25 they were buying and selling stolen clothes from each other.

1 But there's no proof that anything that happened
2 before that was anything like this alleged kidnapping that's
3 described. The blood that's found in the car, is it ever
4 tested? I would assume that -- I mean, the reports indicate
15:38:10 5 that it was sent for testing. Does it match anybody?

6 Your Honor, quite simply, I understand that the
7 burden of proof is low, but the burden of proof can't be
8 just, "Well, it shows up in a police report."

9 For those reasons, we would ask the court to not
15:38:26 10 apply the four levels. Thank you.

11 THE COURT: Thank you, Mr. Thompson.

12 Ms. Klump?

13 MS. KLUMP: Thank you, Your Honor. I'd like to
14 just briefly respond to a couple of the legal points that
15:38:36 15 Mr. Thompson made.

16 First, as I cited in my memorandum, as I too would
17 like to incorporate my comments in my memorandum, the fact
18 that the charges were dismissed or even if no charges had
19 been brought at all in connection with the kidnapping, that
15:38:53 20 is not determinative for this court. And we know that, of
21 course, because this enhancement was applied at the
22 defendant's original sentencing and those charges at that
23 time were still pending.

24 Along those lines, the fact that the victim did
15:39:07 25 not show up in the county and the county prosecutor's motion

1 to continue that trial was denied should not defeat
2 application of this enhancement here.

3 We know from the Ford case, which was cited in
4 Mr. Thompson's memo, that the victim's unavailability does
15:39:26 5 not bar the imposition of this enhancement. Certainly, his
6 failure to show up for the trial, under circumstances that
7 we don't know the reasons why, should not undermine the
8 evidence that otherwise supports this enhancement.

9 Similarly, with respect to the victim,
10 Mr. Thompson made comments suggesting that perhaps the
11 victim and other witnesses had baggage of their own. That
12 certainly may be true. I am not aware of the circumstances
13 surrounding that. But regardless of the character of a
14 victim, they are still protected from violence that's
15 brought against them.

16 Also, with regards to the standard and going into
17 the facts that are relevant here, I would dispute
18 Mr. Thompson's statement that the standard is low. He's
19 certainly correct, the standard is not probable cause, but
20 is preponderance of the evidence. And I think that is a
21 standard that is -- that holds weight and is satisfied here.

22 I know the court has already reviewed my
23 memorandum. I've also referenced in that memorandum the
24 police report, Docket 63-1, which was already in the record
15:40:52 25 and already available for the court's review.

1 But I think a review of all of those facts, as
2 well as the facts in the PSR, support the enhancement. Not
3 to belabor that, but just to quickly touch on some of those
4 facts. Starting with the matching vehicle. There were
15:41:10 5 witness reports of a vehicle, which was later very similar,
6 if not identical to the vehicle that was seen at the time of
7 Mr. Malone's arrest, along with Mr. Cooper.

8 In addition, the telephone number that was
9 reported, and then the telephone number for which those
15:41:33 10 phone records were reviewed traced physically to the address
11 referenced in the police report at which Mr. Malone and
12 Mr. Cooper were present.

13 That further supports the reliability, at least to
14 this extent, of the victim's and witnesses' statements.
15 Once there, not only did the ransom call phone number pan
16 out and trace to a location where Mr. Malone was present,
17 but, again, there was the car that was matching the
18 description of the vehicle that was involved in the
19 kidnapping.

15:42:09 20 Mr. Malone and Mr. Cooper, of course, both had
21 firearms on them. That's consistent with the report that
22 each offender pointed a handgun at Yates and Malone. So to
23 the extent Mr. Thompson argued there was only one firearm
24 involved, it appears that each offender, each of the four
15:42:25 25 kidnappers had a firearm.

1 Again, that's consistent here with the evidence
2 found on these men. Mr. Malone himself had duct tape, a
3 black mask and hat. A black hat and mask would be
4 consistent with the descriptions given by the witnesses, as
15:42:40 5 well as the duct tape being consistent with the fact that
6 the victim was bound during the course of the incident.

7 As far as Mr. Cooper, Mr. Cooper also had a black
8 hat. Of course, the firearm. And he had a handcuff key,
9 which, again, is consistent with the reports by the
15:42:55 10 witnesses.

11 There was some argument made regarding which
12 firearm was involved. As I've already pointed out in my
13 memorandum, and I think is clear in the guideline
14 commentary, the firearm that Mr. Malone was arrested with
15 need not be the exact same firearm that he used in the
16 kidnapping. I think there is sufficient evidence here to
17 make that inference. But regardless, even if the court
18 didn't find that that identity was demonstrated by the
19 government, I think there is certainly the necessary clear
20 connection that the law requires here.

21 I mean, here we have an ongoing event,
22 essentially, from the kidnapping at approximately 8 p.m., a
23 relatively short time elapses from the kidnapping, and then
24 there's the ransom call, the police and the FBI are
15:43:48 25 involved, and then the arrest of Mr. Malone and Mr. Cooper

1 the next morning, when the corroborating evidence is still
2 on their persons. That's not coincidental, but a clear
3 connection between the two incidents.

4 I would just close, Your Honor, with, again,
15:44:04 5 reiterating the evidence in the record that we see, both in
6 the PSR and that is highlighted in my memo. And would also
7 note that the case law in Ford, as well as Johnson, a
8 different Johnson than the infamous Johnson referenced
9 earlier, but both of those Sixth Circuit cases support that
15:44:27 10 "reliable evidence such as a 911 call or police report
11 supplies the requisite facts." Then, in that case, the
12 enhancement can be applied.

13 Here I think the police reports in evidence, as
14 well as some of the dispatch records that are included in
15 that report, and I think all that together supplies ample
16 evidence for this court to apply the four levels.

17 Thank you.

18 THE COURT: Thank you. Mr. Thompson, would you
19 like the last word?

15:44:54 20 MR. THOMPSON: Yes, Your Honor.

21 I believe the only thing I'd directly respond to
22 is the concept that a police report is inherently reliable
23 evidence. I think there's a different question that's
24 being -- or a different factual scenario that's being
15:45:11 25 presented here, and I don't think there is a police officer

1 that would disagree with the statement that although -- just
2 because a witness statement is contained in a police report
3 doesn't make it reliable. No one believes that. Otherwise,
4 there would be no need for courts. There would be no need
15:45:32 5 for cross-examination or jurors. They would simply present
6 police reports to judges and it would be a fait accompli.

7 I would ask the court again to not apply the four
8 levels. Thank you.

9 THE COURT: Thank you both. And just so that the
10 record is clear, when we speak about this objection,
11 Mr. Thompson, I think it also incorporates your -- it
12 certainly incorporates the objection on page 23 that's
13 identified as number 1, correct?

14 MR. THOMPSON: Yes, Your Honor.

15 THE COURT: And then, of course, number 2, because
16 that would reflect the number, whether 22 or 26, agreed?

17 MR. THOMPSON: Yes.

18 THE COURT: Fair enough.

19 I've listened to what's been said here today and
20 also, in advance of entering the courtroom, reviewed what's
21 been written. And as Mr. Malone knows, I've had the
22 opportunity to review this record not only once before on
23 the occasion of my sentencing of you, sir, but also of
24 Mr. Cooper, who was with you at the time of your arrest.

15:46:38 25 And I found helpful what was written in both

1 memoranda, that meaning the one filed by the government and
2 also that filed on behalf of Mr. Malone by Mr. Thompson,
3 drawing my attention to the standard.

4 And while I agree with both of you in the sense it
15:46:58 5 is not the highest standard, but the preponderance of the
6 evidence is a substantial enough standard, meaning it more
7 likely than not is the test that I must employ. And when I
8 employ that test, the question I must answer is whether or
9 not there is a preponderance of the evidence presented by
15:47:20 10 the government that you, Mr. Malone, committed another
11 felony offense and/or -- and used or possessed a firearm in
12 connection with that offense.

13 And the guidelines offers a fair amount of help.
14 It starts by reminding me that this enhancement is only to
15 be applied if the firearm or ammunition facilitated or had
16 the potential of facilitating another felony offense or
17 another offense respectively, it's written.

18 And it also makes clear that in determining
19 whether or not this application is appropriate, I must
15:47:56 20 consider the relationship between the instant offense and
21 the other offense. And we know the other offense is that
22 that's either referred to as a kidnapping or felonious
23 assault, but that conduct which occurred in violation of law
24 on the 3rd and/or 4th of November, 2014, wherein Mr. Yates
15:48:19 25 was pistol-whipped and taken, presumably against his will.

1 So when I consider whether or not the connection
2 between the firearm and the other felony was merely
3 coincidental, I find that it's not for many of the reasons
4 not only written by Ms. Klump, but also articulated by her
15:48:43 5 here today.

6 And if you follow just the timeline, that being
7 the time of the alleged abduction -- and I say that because
8 while it's certainly not the case that there would be a
9 conviction in state court of the matter that's now
15:48:57 10 dismissed, because there was a dismissal, I won't presume
11 that there is more finality to that charge than there
12 otherwise is.

13 But the timeline ties together your possession of
14 the firearm in connection with another felony offense. I
15 find the phone call to be extremely damning evidence if this
16 matter were to have gone to trial for you.

17 It matters to me significantly when I consider the
18 connection between your possession of the firearm and the
19 other felony offense, that the call was made from a phone
20 that was tied to you, that call and phone service technology
21 was used to find you at the place where you were arrested
22 shortly after leaving. And that's more than just mere
23 coincidence.

24 I also -- and this is without reciting all of the
15:49:54 25 facts, although I am very tempted, as you were, Ms. Klump,

1 to do just that.

2 That you were carrying a black hat and a mask
3 consistent with the witnesses' descriptions of what the
4 kidnappers had.

15:50:10 5 And I understand your point, Mr. Thompson, about
6 confrontation and cross-examination, but this is the
7 preponderance of the evidence. And I don't need the test
8 that results when there is confrontation to have what
9 witnesses at least were able to report to the police, that
15:50:28 10 is memorialized in a report that's nothing more than a
11 report. But when there is so much of that report that is at
12 least supported by information such as that found on
13 Mr. Malone, not to mention the least of which was a loaded
14 weapon.

15:50:46 15 I mean, you didn't just have a weapon in your car,
16 you had a weapon on your person, a weapon that was ready to
17 shoot, a bullet in the chamber, as well as a fully loaded
18 clip. So that tells me that you probably had some intention
19 of at least being able to readily fire that firearm should
15:51:06 20 it become necessary.

21 So what I will state for the record is what's
22 written at government's memorandum, that styled at -- or
23 docketed as ECF Number 106, starting on page ID number 698,
24 under subsection 2, "Other Felony Offense Enhancement," and
15:51:27 25 continuing on to page ID 700, I adopt. I think it makes

1 sense. It certainly supports beyond, by a preponderance of
2 the evidence that the application suggested by the
3 presentence report of the four-level enhancement is
4 appropriate.

15:51:47 5 And I find that by a preponderance of the
6 evidence, you did possess the firearm during the commission
7 of another felony offense, and in particular, that charged,
8 albeit now dismissed, that occurred between the 3rd and the
9 4th of November, 2014.

15:52:07 10 That you used or possessed a firearm in connection
11 with that offense.

12 That the connection was not merely coincidental.

13 And I agree with you, Ms. Klump, that the
14 recovered firearm need not be the same firearm used in the
15 prior incident, although I do infer that it was, especially
16 since so much of what was also used in the prior incident
17 remained with or on Mr. Malone. Meaning he still had the
18 mask. He still had the duct tape. So why shouldn't he
19 still have the same weapon that was one of the four
20 brandished on that evening?

21 I also find that the -- by a preponderance of the
22 evidence, that the felon in possession charge, which is
23 brought here in federal court, and the felonious assault
24 and/or kidnapping offenses that have been dismissed were
15:53:01 25 part of the same course of conduct, scheme or plan.

1 And for all of those reasons, I overrule your
2 objection, Mr. Malone, and I do apply, as I did before, the
3 four-level enhancement suggested in the presentence report.

4 Your objection is noted but overruled.

15:53:20 5 So now we're to paragraph 20, which suggests an
6 adjusted offense level of 26. I don't believe the report is
7 in error when it leaves at zero victim-related adjustments
8 or adjustment for role in the offense or adjustment for
9 obstruction. I don't think you argue against those. Do
15:53:40 10 you, Ms. Klump?

11 MS. KLUMP: No, Your Honor.

12 THE COURT: Certainly I don't expect you to,
13 Mr. Thompson. But just tell me, while it's not what you
14 wanted, the math is correct at 26 at paragraph 20, isn't it,
15 sir?

16 MR. THOMPSON: It is, Your Honor.

17 THE COURT: So now we're down to acceptance of
18 responsibility. Not much has changed except the Sixth
19 Circuit has ruled in concert with the United States Supreme
20 Court, so I find that Mr. Malone is, while I'm not thrilled
21 about his ultra vires actions when he had counsel, I don't
22 think they amounted to activity sufficient enough for me to
23 believe that he has no longer accepted responsibility, and
24 I'm still inclined to award the two levels, and I wonder if
15:54:24 25 the government is still inclined to ask for the third level.

1 MS. KLUMP: Yes. We make that ask now.

2 THE COURT: I grant that motion, finding that
3 three levels downwards for acceptance is appropriate.

4 And ask again, do you agree with the math at
15:54:38 5 paragraph 24, Mr. Thompson --

6 MR. THOMPSON: Yes, Your Honor.

7 THE COURT: -- twenty-three?

8 Then, Ms. Klump, how about you, 23 is correct?

9 MS. KLUMP: Yes, Your Honor.

10 THE COURT: I'd like to make sure, before we go on
11 to criminal history, that I've treated appropriately the
12 objections. And the next objection is one regarding
13 criminal history, so we're now at objection number 4.

14 So if you'll join me, I'd like you to go to page
15 14, where the criminal history is summarized. And as we
16 consider page 14, paragraph 38, Mr. Thompson, would you like
17 to be heard about your objections lodged on behalf of
18 Mr. Malone regarding the two cases that result in six
19 criminal history points instead of three?

20 MR. THOMPSON: Yes. Thank you, Your Honor. I
21 just want to make sure I have the correct paragraphs.

22 THE COURT: Thirty-four and thirty-five. They're
23 on page 12.

24 MR. THOMPSON: I believe I identified them
15:55:54 25 incorrectly in my objections. I think I identified 33 and

1 34. Thank you for correcting that, Your Honor.

2 THE COURT: I think Mr. Wlotzko updated it by
3 inserting 34 and 35. Do you --

4 MR. THOMPSON: Right. I see that now. Thank you.

15:56:14 5 THE COURT: And that happens. When the report is
6 revised, the paragraphs almost always increase by one.

7 MR. THOMPSON: Your Honor, I don't know that I can
8 add anything to the objection as written. Having said that,
9 I will, once again, repeat it probably unnecessarily.

15:56:30 10 And quite simply, the fact that these two
11 paragraphs are two separate charges, one in federal court,
12 one in state court, is solely by a quirk of the charging
13 decisions of the two respective sovereigns. Either of the
14 two sovereigns could have handled all of these charges
15 together. There is no -- it's just simply a quirk of fate,
16 and the difference between three and six points shouldn't be
17 subject to that. We would ask the court to consider those
18 as one offense for three points. Thank you.

19 THE COURT: Thank you.

15:57:07 20 Ms. Klump?

21 MS. KLUMP: Thank you, Your Honor. I would agree
22 with the probation officer's response, and I would just also
23 note that to the extent it's a quirk of fate, although I
24 would disagree with that characterization, certainly the
15:57:23 25 sentences that Mr. Malone did receive in the county, for

1 example, for trafficking, may very well have been different
2 had it been a federal indictment with regards to that
3 charge. Certainly we're not going into speculation as to
4 what that would have been, but likely it would have been
15:57:44 5 higher in federal court. So to the extent he's benefited by
6 being charged in state court with that offense, I think he
7 certainly should take the arguable, I guess, downside of
8 them counting separately.

9 Also, in addition, I think just on sort of an
10 equitable level, Your Honor, this certainly shouldn't be
11 counted as a single sentence. Never mind the technical
12 argument that I think very clearly shows that they are
13 counted separately. But also, if you just look at the
14 trafficking offense that occurred on May 23rd, that only
15 relates to one of the dates for Mr. Malone's federal felon
16 in possession charges. He also had another offense, which
17 occurred some five or so months earlier.

18 And for all of those reasons, we would ask that
19 the court overrule the objection.

15:58:38 20 THE COURT: Help me. You said May 23rd, but you
21 didn't give me the year.

22 MS. KLUMP: I'm sorry. May 23rd, 2006 was the --
23 appears to be the date of the trafficking offense in
24 paragraph 34. And then the federal felon in possession
15:58:54 25 dates were also May 23rd, 2006, and then January 12th, 2006.

1 So approximately five months previously.

2 THE COURT: Thank you.

3 MS. KLUMP: Thank you.

4 THE COURT: Mr. Thompson, and I want to ask you
15:59:07 5 this just so that I don't overlook something that you may
6 have wanted me to pay greater attention to.

7 In the response by Mr. Wlotzko, you see that if
8 you focus primarily on the second paragraph of that
9 response, he gives what I think is a technical reason why
15:59:27 10 it's not an error for those two offenses, that being the
11 offense conduct at paragraph 34 and 35, to be treated
12 separately.

13 I didn't hear you argue against those, but rather,
14 use the quirk of fate explanation and the similarities.

15:59:48 15 Because you can see that Mr. Wlotzko is agreeing, yes, those
16 two offenses, the trafficking and the felon in possession,
17 do stem from a single arrest, but were not in the same
18 charging instrument, could not have been. One is federal,
19 one is state. Right? And the sentences were not imposed on
20 the same day.

21 You don't disagree with that?

22 MR. THOMPSON: I don't disagree with any of those
23 points, Your Honor. However, I would -- if I could expand,
24 quirk of fate was probably --

16:00:15 25 THE COURT: And I'm not picking on you for that.

1 What I'm focused on is this: I think your objection is
2 without merit and I plan to overrule it. But if you want to
3 persist with the departure or variance argument because of
4 the quirk of fate, I think that's the better place for you
16:00:31 5 to make that. I'm not going to pretend that I think it will
6 have better traction then, but I just want you to tell me if
7 you believe there's a technical error in the way paragraphs
8 34 and 35 are scored.

9 I can tell you, I do not believe there is. I
16:00:50 10 think, for the reasons explained by Mr. Wlotzko, that they
11 are appropriately scored.

12 I understand your quirk of fate argument to mean
13 that had he been charged in one place instead of two, he'd
14 have only three points instead of six.

16:01:07 15 That's why I'm suggesting maybe you suffer the
16 fate of the overruling of that objection now, but you use
17 your talents to ask for what consideration you think may be
18 given when you ask for a departure or variance. A variance
19 would probably be your take. But up to you.

16:01:26 20 Make sense?

21 MR. THOMPSON: Yes, Your Honor.

22 THE COURT: I adopt the response by the probation
23 officer and overrule Mr. Malone's objection, finding that
24 paragraphs 34 and 35 are appropriately scored, for the
16:01:41 25 reasons identified on page 24.

1 Now, this is the place to -- I am on page 25,
2 Mr. Thompson. This enhancement, or the additional two
3 points for post-conviction, and that's -- if we go back to
4 page 14, starting at paragraph 36, you can see that when you
16:02:26 5 add the scored convictions, the score is 11.

6 Any objection to that, Ms. Klump?

7 MS. KLUMP: No, Your Honor.

8 THE COURT: Mr. Thompson?

9 MR. THOMPSON: No, Your Honor.

16:02:36 10 THE COURT: I think it's the next paragraph where
11 you do have an objection, paragraph 37. And this ties into
12 the objection that I was just speaking about on page 25.

13 Because Mr. Thompson [sic] was on -- or under the
14 supervision of Adult Parole Authority, two points were
16:02:57 15 added. Would you like to be heard about why you believe
16 those two points should not be added?

17 MR. THOMPSON: Your Honor --

18 THE COURT: At least that's what I believe you're
19 saying on page 25.

16:03:05 20 MR. THOMPSON: Yes, Your Honor. That's actually
21 the objection submitted directly by Mr. Malone.

22 And to be clear, Mr. Malone, and not myself, was
23 under supervision by parole.

24 But his argument -- and I definitely sympathize
16:03:18 25 with his argument. His argument is, in essence, that after

1 the fact, the court determined that his post-release control
2 should never have been imposed. It was void.

3 THE COURT: Did it really? Or did it just
4 terminate? Isn't that the problem? Because it didn't void
16:03:37 5 it, it just said, "Okay, we'll stop it now." It's not a
6 nunc pro tunc, is it?

7 MR. THOMPSON: I think that they rendered it void.
8 I actually think -- I believe legally, the way it works in
9 Ohio, had he been charged with an escape for -- in Ohio, you
16:03:52 10 can be charged with an escape for failing to report to your
11 parole officer. If you're under post-release control, it's
12 technically charged as an escape. That escape charge, you
13 can defend that successfully by saying, "Well, no, he was
14 never properly on post-release control."

16:04:09 15 So, I mean, I definitely get where he's coming
16 from. And if the court could rule on it as Your Honor did
17 his prior objection, that would, I believe, preserve it for
18 the record.

19 THE COURT: Thank you.

16:04:19 20 Let me hear from Ms. Klump.

21 MS. KLUMP: Thank you, Your Honor. I wasn't aware
22 there was a dispute as to the factual statements made by the
23 probation officer, from which it appears to me that the
24 defendant's motion to render his period of supervision void
16:04:40 25 was denied, but rather, as the court said, it was simply

1 terminated. On that basis, I believe the two levels -- or
2 the two additional criminal history points should apply.

3 In addition, speaking on more of the equity
4 grounds, if the court should wish to continue on to that
16:04:59 5 point, I believe regardless of what happened retroactively,
6 and it doesn't appear that Mr. Malone's supervision was
7 voided, but even if it had been for some reason, at the time
8 of the offense, he was certainly under supervision. That
9 was intact and everything at that point. He thought he was
16:05:18 10 under valid supervision.

11 For all of those reasons, sort of the heart or the
12 spirit, for lack of a better word, of those two levels
13 certainly apply. And for the reasons already stated and for
14 the probation officer's factual statements, I would ask the
16:05:37 15 court to apply those two points.

16 THE COURT: Thank you both for what you've said.

17 I have one question for you, Mr. Wlotzko. On page
18 25, under your response, the second full paragraph --

19 PROBATION OFFICER: Uh-huh.

16:05:50 20 THE COURT: -- where it says, "On April 19, 2016,
21 the defendant filed a motion to modify the judgment of the
22 Cuyahoga County Court of Common Pleas from April 1," then
23 you have quotations around language that says, "'to reflect
24 the previous judgment under which post-release control was
16:06:09 25 imposed is now void.'"

1 Whose quoted language is that, is that
2 Mr. Malone's language?

3 PROBATION OFFICER: Yes, Your Honor.

4 THE COURT: All right then.

16:06:18 5 I overrule the objection, Mr. Malone, and find
6 that you were indeed under a term of state supervision at
7 the time the offense was committed, making the two-level
8 increase appropriate, and do preserve your objection for
9 later appellate review.

16:06:37 10 I think, Mr. Thompson, then, that we've included
11 all of the objections that are noted, haven't we, sir?

12 MR. THOMPSON: Yes, Your Honor.

13 THE COURT: Then let's make sure that we
14 understand what the range is. Again, using the calculation
15 of criminal history that is shown on page 14, now we're at
16 paragraph 38, total criminal history score is 13. The 13
17 corresponds with a criminal history category of VI. VI
18 intersects with an offense level of 23, suggesting, and it's
19 by no means anything other than a suggestion, but it's one
20 where I will start for sure, 92 months at the low end, 115
21 months at the high end.

22 Any objection to that, Ms. Klump?

23 MS. KLUMP: No, Your Honor.

24 THE COURT: And again, Mr. Thompson, I'm not
16:07:33 25 asking that you waive any objections, but just correct me if

1 I'm wrong when I think our offense level is calculated, at
2 least that by me, as 23, criminal history is VI, the
3 intersection of the two is at 92 to 115 months, sir.

4 MR. THOMPSON: That's correct, Your Honor.

16:07:50 5 THE COURT: All right. We've completed the first
6 phase of the sentencing hearing. Now I am prepared to move
7 on to the phase of allocution. I will hear from Ms. Klump
8 first, next Mr. Thompson, and lastly Mr. Malone.

9 Ms. Klump, when you're ready.

16:08:08 10 MS. KLUMP: Thank you, Your Honor.

11 The government would request that the court impose
12 the same sentence as it previously did, that is, 120 months.
13 The government recognizes that that would represent a
14 five-month upward variance from the guidelines range, but
16:08:25 15 believes that the sentencing factors, in fact, all of the
16 sentencing factors that the court is to consider weigh in
17 favor of a very significant sentence.

18 Just to start with, the nature and circumstances
19 of the offense, Your Honor. I won't belabor details that
16:08:40 20 I've already discussed in my memo, as well as during the
21 previous enhancement argument. But again, I would like to
22 just briefly reiterate that Mr. Malone's felon in possession
23 offense demonstrated aggravating factors, if we just isolate
24 our consideration of the facts to his arrest.

16:09:08 25 He had a firearm. That firearm was stolen. As

1 the court is aware, that already exacerbates the nature of
2 the offense in terms of where that weapon came from and the
3 other crime that must have been committed at some point in
4 order for it to have been reported stolen.

16:09:24 5 We also know that Mr. Malone's firearm was loaded,
6 as the court already noted, with, I believe it was 15
7 rounds, including one round in the chamber. The firearm was
8 on Mr. Malone's person and very accessible and ready to go,
9 for lack of a better term.

16:09:42 10 Although knowledge of -- Malone's knowledge of the
11 fact that he was a prohibited person is certainly not an
12 element of the offense, I do think it's relevant for the
13 court's consideration when it looks at what sentence to give
14 Mr. Malone. As I'll touch upon in just a little bit,
16:10:04 15 Mr. Malone already had a federal felon in possession count.
16 He knew not just that he wasn't allowed to have a firearm
17 based on his state convictions, he knew already that he
18 wasn't allowed to have a firearm, whether it be under state
19 law or federal law, from firsthand experience.

16:10:19 20 And in addition, of course, if you expand your
21 consideration of the conduct from outside his just mere
22 arrest to the relevant conduct that we've already discussed,
23 then you see additional exacerbating factors, the violence
24 involved in this kidnapping, the binding of the victim,
16:10:38 25 putting the victim in the trunk, I believe, of the car,

1 demanding ransom, pistol-whipping, all of these facts weigh
2 further in favor of a very lengthy sentence.

3 As to the history and characteristics of
4 Mr. Malone, I believe those also weigh in favor of the
16:10:55 5 maximum sentence here. Unlike other defendants who come
6 before the court, we know exactly what the defendant does
7 when he's armed with a firearm. As I noted in my sentencing
8 memorandum, Mr. Malone has numerous offenses, some of them
9 violent, and I'll use "violent" with a lowercase "v,"
16:11:19 10 post-Johnson. But regardless, many of his previous offenses
11 involve firearms, whether or not it was a, quote, "firearms
12 offense" that he was charged with and convicted of.

13 As you'll see in the PSR, numerous offenses
14 involved the firearm being discharged, and it was the
16:11:35 15 defendant who discharged the firearm. In one case, a
16 61-year-old individual was harmed, was shot and injured as a
17 result of Mr. Malone discharging his firearm. And that
18 isn't -- the evidence, as you can see in the PSR, isn't
19 relying on just victim statements or witness statements or
20 anything, but it's relying on forensic evidence and gunshot
21 residue that was analyzed as a part of that crime.

22 That offense wasn't the only instance in which
23 Mr. Malone discharged a firearm. And then again, in this
24 current offense that we're looking at, again, he used the
16:12:18 25 firearm. We don't have evidence that he discharged it, but

1 he certainly used it to manipulate other people to do what
2 he wanted them to do in a violent incident that was
3 motivated apparently by greed.

4 In addition to that, to all of those different
16:12:39 5 prior convictions, he also has the drug trafficking
6 conviction that was referenced. There are also other
7 references to the defendant being in possession of drugs,
8 regardless of whether or not he picked up a charge in
9 connection with those possessions.

10 There's also numerous probation violations. And,
11 obviously, none of those prior sanctions carried any -- or
12 I'll back that up, carried a sufficient deterrent effect for
13 Mr. Malone.

14 His previous federal offense resulted in a
16:13:20 15 65-month sentence, and that, as I said, certainly did not
16 deter him from reengaging in violent behavior. This isn't
17 an individual who had the gun in his upstairs dresser or
18 tucked underneath the seat of his car, but it was one that
19 was in his hand, being actively used to the detriment of his
20 community.

21 In light of all those factors, Your Honor, and all
22 of the things that I mentioned in my sentencing memorandum,
23 the government would request a sentence of 120 months. We
24 would oppose a downward departure, to the extent the
16:13:51 25 defendant made one pro se. The criteria set out in

1 Guideline 4A1.3(b)(1) are certainly not met here. Both the
2 seriousness of Mr. Malone's criminal history and his
3 likelihood of committing new crimes, both of those factors
4 are high and certainly would weigh against a downward
16:14:17 5 departure and, in fact, weigh in favor of an upward
6 variance.

7 So to reflect adequately the severity of the
8 offense, to deter Mr. Malone from continuing to engage in
9 violent criminal behavior, to promote respect for the law,
16:14:31 10 achieve just punishment, and most importantly, to protect
11 the public, the government would request a sentence of 120
12 months.

13 Thank you.

14 THE COURT: Thank you, Ms. Klump.

16:14:43 15 Mr. Thompson, I am prepared to hear your
16 allocution now.

17 MR. THOMPSON: Your Honor, if I could start
18 with -- I'm sorry. I apologize, Your Honor. I was speaking
19 with Mr. Malone there for a second.

16:14:55 20 THE COURT: Sure.

21 MR. THOMPSON: Should we approach the podium?

22 THE COURT: If you'd like to, please do.

23 MR. THOMPSON: Would you like to come up?

24 Your Honor, if I could start with the downward
16:15:23 25 departure argument for overrepresentation of criminal

1 history. This is focused on that quirk of fate I referenced
2 earlier. This is currently paragraphs 34 and 35. I want to
3 be sure that the record is clear as to what exactly happened
4 here. Okay.

16:15:43 5 Mr. Malone is arrested. He is charged with
6 possession of the firearm in federal court. He's also
7 charged with drug trafficking, some small amount of
8 marijuana, which would not have carried a significant
9 federal penalty, and a firearm specification in state court.
16:16:01 10 He's charged with that same gun in both state and federal
11 court.

12 In the federal case, coincidentally, or not
13 coincidentally, incidentally, he receives, in his
14 calculation, a plus four-level increase for use of a firearm
16:16:18 15 in facilitating another felony offense. He also, in that
16 federal case, has a second federal 922(g) charge.

17 In scoring that as two separate convictions and
18 scoring it as six total points rather than three, that
19 overrepresents -- in the plainest of language, in common
20 sense use of the phrase "overrepresents," it pretends, it
21 creates the legal fiction that there were two separate acts
22 by him, as opposed to the reality of one.

23 For that reason, we would -- and in addition to
24 the arguments set forth in the memorandum, we would ask the
16:16:54 25 court to downward vary by -- downward vary and/or depart by

1 one level, down to a range of 84 to 105 months.

2 I am not going to belabor the arguments made in
3 our sentencing memorandum. I would ask for the court to
4 consider RDAP. His drug history is significant. And it's
16:17:20 5 clear that he's taking full advantage of the programs that
6 are available to him in prison.

7 I would emphasize one of the points he raised in
8 one of his pro se filings, which is he would like this court
9 to note that he has not had any incidents while he has been
16:17:37 10 in federal prison.

11 THE COURT: There is a discontinuation from one of
12 the programs without explanation. What can you tell me
13 about that?

14 MR. THOMPSON: I would ask Mr. Malone to address
16:17:49 15 it, Your Honor.

16 THE COURT: It's referenced on page 4, paragraph
17 5.

18 THE DEFENDANT: I don't know which program it is.

19 THE COURT: It's the Personal Success class -- no,
16:17:59 20 it isn't. It is the Non-Residential Drug Treatment Program.
21 On May 17, 2016, you were discontinued. The caseworker was
22 unable to tell us why. What can you tell me?

23 THE DEFENDANT: The reason, Your Honor, that it
24 was discontinued was because I signed up for both programs
16:18:15 25 at the same time and I was accepted into the Challenge

1 Program first, so the non-residential drug treatment
2 specialist told me that I cannot take both programs at the
3 same time. So I chose to stay enrolled at the time in the
4 Challenge Program.

16:18:31 5 THE COURT: Is it your understanding that at some
6 later time, you'll be eligible for the Non-Residential Drug
7 Treatment Program?

8 THE DEFENDANT: Yes, after I complete the
9 Challenge Program.

16:18:41 10 THE COURT: Thank you.

11 Mr. Thompson, have I heard you fully, sir?

12 MR. THOMPSON: Yes, Your Honor.

13 THE COURT: Then, Mr. Malone, I am certainly
14 interested in hearing what it is you'd like to say.

16:18:54 15 THE DEFENDANT: First off, Your Honor, I would
16 like to apologize to the court. You know, there is no
17 excuse for my actions. It was blatant disrespect.

18 Since being incarcerated, I have had the
19 opportunity to sit down and specifically focus on, you know,
16:19:10 20 the reasons why I continue to do what I do. And being that
21 I had the time to speak, you know, with my treatment
22 specialist, you know, I determined that, you know, my
23 attitude, my behavior and, you know, the reasons for doing
24 what I was doing, it was wrong. So I would like to ask the
16:19:29 25 court for leniency. You know, me dealing with issues with,

1 you know, my upbringing, my family, you know, the shame that
2 I've caused them, that is more than enough for me to, you
3 know, have learned my lesson. And despite what sentence you
4 choose to impose today, you know, I ask the court for
16:19:48 5 leniency.

6 THE COURT: You know, I was hoping to hear
7 something maybe a little different from you or maybe a
8 little more, or maybe hoping against hope that there might
9 be some explanation.

10 You've spent most of your adult life in prison,
11 and most of the time you're out of prison, you're working on
12 getting back into prison. Are you finished? Is there
13 anything else you'd like to say to help me to understand why
14 it is you're more trustworthy outside of prison than in
16:20:01 15 prison? It seems that when you're outside of prison, you
16 carry weapons, you sling drugs, you hurt people. Yeah, you
17 disappoint your family, but more than anything else, you
18 break the laws our society must rely on to keep us all safe.

19 And I don't know, based on this record, of course
20 now, while you're in prison, it seems that you're doing
21 well, but, of course, you're in prison. I am not sure -- if
22 there's anything else you can say, now is the time to say
23 it, because I don't mind telling you, I'm almost entirely,
24 almost entirely unimpressed by what you've said so far.

16:20:55 25 Make sense?

1 THE DEFENDANT: Yes, Your Honor.

2 THE COURT: Anything else?

3 THE DEFENDANT: Well, since being in prison, you
4 know, on a day-to-day basis, it's not an easy environment to
16:21:04 5 survive in.

6 THE COURT: But why is it different? Like I said,
7 you've spent most of your adult life in prison. And this
8 isn't even your first stint in a federal prison. So why is
9 this time any different?

10 THE DEFENDANT: Well, Your Honor, a couple -- on a
11 couple different occasions, you know, while I was out in
12 society, there were positive things that I was doing. But
13 due to my drug use, I relapsed and continued to think in a
14 criminal way.

15 So, like I said, as far as me being out, there
16 were positive -- there were times where, you know, I did
17 strove to do the right thing, but I fell short.

18 THE COURT: All right. Anything else, sir, that
19 you'd like me to hear before I sentence you?

20 THE DEFENDANT: That will be all, Your Honor.
21 Thank you.

22 THE COURT: Certainly.

23 Mr. Thompson, I respect your work and I do
24 appreciate you taking all the time you've taken in working
16:22:02 25 with Mr. Malone and orally and in writing articulating

1 arguments that I think are the best that could have been
2 made on his behalf.

3 I have considered all that you've asked me,
4 including that which was made known prior to me coming into
16:22:21 5 court here today. And as I said earlier, I find the
6 technical application of the two-level adjustment upwards
7 for criminal history to be correct. And while I do
8 appreciate your explanation about paragraphs 34 and 35, I
9 don't find the separation of those charges to be anything
16:22:45 10 that overstates Mr. Malone's criminal history. In fact, if
11 anything, I think 13 is probably still too low.

12 When I look at the detail, the actual criminal
13 conduct that you've committed, that which you've been
14 convicted of, that which has been either charged and/or
16:23:02 15 dismissed but otherwise is unscored, you are one of the
16 violent, small letter "V," actors, most that I've had in
17 this courtroom.

18 You see, federal court is usually -- certainly a
19 fair number of drug traffickers and felons in possession,
16:23:22 20 but not people who are so ready to use a weapon as you've
21 shown that you are, as you've shown particularly in this
22 case, which is a large part of the reason for the four-level
23 adjustment upwards that we spent so much time on here today.

24 So when I think about the 3553(a) factors, and all
16:23:40 25 of them, while I won't detail all of them, but starting with

1 the nature and circumstances of the offense, which is just
2 horrendous, absolutely horrendous that any person would do
3 to another person what you and Mr. Cooper did to Mr. Yates,
4 and then expect to profit from it.

16:23:56 5 But then when I also look at your history and
6 characteristics, including your prior record, including any
7 violence, your age, the fact that you have had opportunities
8 outside of prison, and really had an upbringing not much
9 different from that of many people.

16:24:13 10 And then move on to need for the sentence imposed.
11 Just punishment, you know that that's part of what I'll do.
12 But more than anything, you're such a young man. Even with
13 a stiff sentence, which I will impose, I'd like to deter
14 you, for two reasons. One is to keep society safe. The
16:24:31 15 other is to give you some chance at some point to live a
16 part of your life outside of prison.

17 I also intend to protect the public, reflect the
18 seriousness of the offense and, to the extent it is still
19 possible, to allow you to improve your conduct and
20 condition.

21 I'm not so sure that what you've said is the case.
22 I believe that you probably don't want to be in prison. Who
23 does? You've been there often enough to probably have a
24 greater dislike for it than many who are incarcerated, but
16:25:02 25 not so great that you refuse to go back.

1 Your efforts, despite the adequate, or beyond
2 that, the more-than-competent representation by Mr. Thompson
3 to take the reins and to write to the court, to urge this or
4 that, to compel movement by the court, tells me that you
16:25:22 5 haven't achieved the humility that I hope you may someday
6 achieve.

7 I tell you this: When I consider whether or not
8 the guidelines range suggested, that being 92 months at the
9 low end and 115 at the high end, is sufficient given your
16:25:41 10 history, I have to agree with you, Ms. Klump, it's not.
11 While five months makes a small difference, I think the only
12 answer I can give to you, to the public, to our system of
13 governance, our system of justice, is to vary upwards by
14 those five months as requested by the government. And I
16:26:01 15 hereby do that and reimpose the term of incarceration
16 imposed before, not because I did it before, but because it
17 is indeed the right sentence in this case for you.

18 You must learn that everyone has a right to be
19 free of violence and intimidation. You are a felon not
20 allowed to possess a weapon, loaded or otherwise. And you
21 know that.

22 One of the reasons, the staunchest, strongest
23 reasons for this five-month variance -- and I will tell you
24 this, I'd go more if I could, but you know the statute stops
16:26:35 25 me at 120 -- this is your second federal felon in possession

1 charge. You were given 65 months. That's more than a
2 significant sentence. And yet you came back.

3 So for those reasons, I find the guidelines
4 inadequate. 120 months is adequate. And that is the term
16:26:59 5 of incarceration that I impose.

6 In addition to that, I impose a three-year term of
7 supervision. Within 72 hours after being released from the
8 Bureau of Prisons, Mr. Malone, you shall meet with your
9 probation officer, who will reacquaint you with all of the
16:27:14 10 conditions of supervision, whether they are mandatory,
11 special or standard conditions.

12 Please don't miss that first initial meeting,
13 because if you do, that will probably be your first
14 opportunity to violate your three-year term of supervision.

16:27:31 15 I will say now, and I will remark in writing, that
16 I will ask the Bureau of Prisons to give you credit for the
17 time you've already served. The presentence report remarks
18 upon what that time might be, but I'm sure it still needs
19 further adjustment.

16:27:45 20 I waive the imposition of a fine, but do impose a
21 \$100 special assessment.

22 And restitution is not an issue, so I will not
23 impose that.

24 I remind you, Mr. Malone, that you shall not,
16:27:59 25 especially not while on this three-year term of supervision,

1 commit another crime, federal, state or local crime, not
2 possess a drug, whether it's legal or illegal, especially if
3 that legal drug is one prescribed for another person.

4 Within 15 days after you're released from prison,
16:28:15 5 you'll have at least the first of three periodic random drug
6 tests. You'll have more than three, so please be prepared.
7 Never do anything to avoid the test, dilute your urine or
8 anything else that will cause you to fail the test,
9 especially ingesting illegal or other controlled substances.

16:28:34 10 Sir, for the rest of your life, you shall not
11 possess a firearm, destructive device or dangerous weapon.

12 You understand that, don't you?

13 THE DEFENDANT: Yes, Your Honor.

14 THE COURT: I am ordering that you participate in
16:28:46 15 an approved program of substance abuse testing and/or
16 outpatient/inpatient substance abuse treatment as directed
17 by your supervising probation officer after an appropriate
18 assessment.

19 And again, don't do anything to obstruct, attempt
16:29:01 20 to obstruct or tamper in any way with the efficiency or
21 accuracy of any drug test that you may be given.

22 I also order that you provide a DNA sample, if you
23 haven't already. My suspicion is that you have.

24 Because of your history of violence, of drug
16:29:18 25 possession, of possession of a weapon, I am ordering that

1 you participate in a search and seizure provision, which
2 allows your person, your body, the place where you live, the
3 place where you work, a computer that you rely on, a car
4 that you drive or are driven in, to be subject to a
16:29:33 5 warrantless search and seizure if there is reasonable
6 suspicion that you're in possession of contraband.

7 So please make sure that those with whom you live
8 or share any of those things, such as a computer or car,
9 know that that can be searched if you have access to it.

16:29:51 10 Mr. Thompson, you spoke to me about RDAP. As you
11 know, I made a recommendation I believe initially when I
12 sentenced Mr. Malone that he be allowed access to drug
13 treatment in prison. It sounds like he's gotten that
14 attention. What were you referring to when you referred to
16:30:10 15 RDAP?

16 MR. THOMPSON: I believe it's the Residential Drug
17 Treatment Program.

18 THE COURT: Outside of prison?

19 MR. THOMPSON: No, Your Honor.

16:30:19 20 THE DEFENDANT: No.

21 MR. THOMPSON: Mr. Malone can --

22 THE COURT: Certainly.

23 THE DEFENDANT: Your Honor, it's inside of prison.
24 It's a program -- it's the 500-hour program where I would
16:30:27 25 have to be transferred to a special facility in order to

1 complete it.

2 THE COURT: Do you have any objection to that,
3 Ms. Klump?

4 MS. KLUMP: No, Your Honor.

16:30:37 5 THE COURT: I will ask the Bureau of Prisons to
6 consider you for that program, and any other sort of
7 program, especially those regarding education and vocational
8 training that may allow you to lead a law-abiding life once
9 you leave prison.

16:30:55 10 Let me ask you, Mr. Wlotzko, regarding other
11 conditions that I should impose that I haven't mentioned, or
12 if I've mentioned, I haven't mentioned articulately.

13 What do you suggest?

14 PROBATION OFFICER: I would have nothing further,
16:31:12 15 Your Honor.

16 THE COURT: Ms. Klump, how about you, before I
17 turn to objections, what would you suggest that I haven't
18 mentioned or that I can perfect if I've mentioned
19 inarticulately?

16:31:25 20 MS. KLUMP: Nothing, Your Honor.

21 THE COURT: Then let me ask you about objections,
22 to any part of the proceedings as to Malone, and separately
23 state your objection, if you have one, to the sentence
24 imposed.

16:31:34 25 MS. KLUMP: No objection, Your Honor. Thank you.

1 THE COURT: Mr. Thompson, I don't know if
2 Mr. Malone would like me to consider a different place of
3 incarceration. You were at McCreary, I believe, U.S.
4 penitentiary?

16:31:46 5 THE DEFENDANT: Correct, Your Honor.

6 THE COURT: Are you happy going back there?

7 THE DEFENDANT: No, Your Honor.

8 THE COURT: Well, you know that I can't do much
9 about that except if you ask me to, ask the Bureau of
10 Prisons to consider a different place. Would you like me to
11 do that?

12 THE DEFENDANT: Yes, Your Honor.

13 THE COURT: Do you have a place in mind?

14 THE DEFENDANT: Somewhere closer to home.

16:32:08 15 THE COURT: If not immediately, eventually?

16 THE DEFENDANT: Yes, Your Honor.

17 THE COURT: You heard me mention educational
18 programs as well as vocational programs. Do you want me to
19 be more specific? Can you give me anything you have a
20 greater interest in, welding, construction, automotives?

21 THE DEFENDANT: Yes. Yes, Your Honor. Welding,
22 electrical and HVAC.

23 THE COURT: I will indicate all three.

24 Mr. Thompson, what have I missed or can improve
16:32:46 25 upon?

1 MR. THOMPSON: Are you asking for objections now,
2 Your Honor?

3 THE COURT: Not yet, in a moment.

4 MR. THOMPSON: Okay. Then nothing else, I don't
16:32:54 5 believe, Your Honor.

6 THE COURT: Okay. Your objections now, please.

7 And all of those stated already you can restate, but know
8 that they're preserved when overruled, but the floor is
9 still yours to articulate them.

16:33:05 10 MR. THOMPSON: Just one second, Your Honor.

11 (Discussion held off the record between the defendant
12 and Mr. Thompson.)

13 MR. THOMPSON: Your Honor, in addition to the
14 objections I've already stated on the record and we've
16:33:32 15 already addressed in court, we would object to the
16 five-month upward variance, in part, as Mr. Malone requests
17 that it be based -- the objection be based upon a violation
18 of the principles set forth in Apprendi, then also as a
19 sentencing violation generally. Thank you.

16:34:04 20 THE COURT: Certainly. And I'll respond that I
21 think the advisory guidelines are a good start. I am
22 certainly not obligated to end with the 115-month sentence.
23 And the advisory guidelines, Mr. Malone, are geared towards
24 the heartland of defendants, most defendants, the common,
16:34:23 25 the general defendant. You are uncommon. You are outside

1 of that general grouping. For several reasons. And I think
2 when your criminal history is reviewed, those reasons are
3 patent. They are obvious. It is violent. It is
4 repetitive. You do the same things in contravention of
16:34:39 5 civil society over and over again.

6 But as I said, chief among all of the complaints I
7 have with that history is that this is your second federal
8 felon in possession of a firearm and ammunition violation.

9 So for those reasons, I note, preserve for the
16:34:58 10 record, but continue to adhere to the 120-month sentence
11 that includes the five-month upward variance.

12 And I do mean what I say, if I were permitted to
13 abridge the 120 months, I would go higher. Maybe another
14 five months. But I can't and I won't.

16:35:16 15 Fourteen days from the date on which I reduce to
16 writing the sentence that I've now imposed is the cutoff for
17 you at least giving the appellate court notice of your
18 appeal.

19 As you know, you don't have to have it all
16:35:27 20 fine-tuned, but just a notice of appeal timely filed to
21 allow the appellate court to know that you're coming.

22 As you may already know, you don't have to worry
23 about whether or not you can afford counsel, counsel will be
24 appointed to represent you. If you and Mr. Thompson decide
16:35:44 25 not to work together, don't worry, there are plenty of

1 capable appellate counsel. So that should not be a reason
2 for you not to appeal.

3 Do you understand, sir?

4 THE DEFENDANT: Yes, Your Honor.

16:35:53 5 THE COURT: Mr. Thompson, if Mr. Malone should ask
6 it of you, even if you and he decide not to work together,
7 would you at least timely file the notice of appeal just so
8 that we know that it's perfected without issue?

9 MR. THOMPSON: Yes, Your Honor.

16:36:06 10 THE COURT: And I do appreciate your hard work on
11 this case. I've grown used to it. You are dogged about all
12 of your cases, but you brought a little extra passion to
13 this one. I appreciate it. You didn't win many of your
14 arguments, and I think that's because the facts and the law
16:36:20 15 were not on your side. But nonetheless, I appreciate what
16 you've done.

17 Is there anything more before I close the record,
18 on behalf of the United States?

19 MS. KLUMP: No, Your Honor. Thank you.

16:36:30 20 THE COURT: On behalf of Mr. Malone?

21 THE DEFENDANT: No, Your Honor.

22 MR. THOMPSON: No, Your Honor.

23 THE COURT: Mr. Malone, I've dealt you a deserved
24 but stiff sentence, and it doesn't mean that I still don't
16:36:38 25 wish you the best, because I do. I think you're greater

1 than you allow yourself to be, and I hope that you get out
2 of your way and become that person.

3 This hearing is adjourned.

4 THE CLERK: All rise.

16:36:51 5 (Proceedings concluded at 4:36 p.m.)

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1 C E R T I F I C A T E
23 I certify that the foregoing is a correct transcript
4 from the record of proceedings in the above-entitled
5 matter.

6

7 */s/ Mary L. Uphold* January 12, 2017
8 Mary L. Uphold, RDR, CRR Date

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